

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 10, 2007 Session

HIRAM LEON ALLEN v. MARGARET ANN ALLEN

**Appeal from the Circuit Court for Sumner County
No. 5971 C.L. Rogers, Judge**

No. M2007-00356-COA-R3-CV - Filed January 4, 2008

Husband and Wife were divorced in 1978. Husband was ordered to pay Wife \$400.00 per month alimony in futuro as well as child support. Husband fulfilled his child support obligations and is current on his alimony payments. In June 2006, Husband filed a Petition to Terminate Alimony alleging there had been a material change in circumstances since the divorce was granted nearly twenty-nine years ago. Wife counter-petitioned seeking an increase in alimony. The Circuit Court for Sumner County dismissed Husband's petition, dismissed Wife's counter-petition, and denied Wife's request for attorney's fees. Husband appeals the dismissal of his petition and Wife appeals the matter of attorney's fees. We affirm the order dismissing Husband's petition to terminate alimony but remand for further proceedings to reassess the distribution of attorney's fees between Husband and Wife.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part,
Reversed in Part and Remanded**

J. STEVEN STAFFORD, Sp.J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Stephen W. Pate, Murfreesboro, Tennessee, for the appellant, Hiram Leon Allen.

Dennis W. Powers, Gallatin, Tennessee, for the appellee, Margaret Ann Allen.

MEMORANDUM OPINION¹

This is a post-divorce action to terminate alimony. Hiram Leon Allen ("Husband") and Margaret Ann Allen ("Wife") were divorced in 1978. Wife was given custody of the couple's two

¹Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

teenage children and the right to reside in the marital residence until the children reached the age of majority at which time the residence was to be sold and the proceeds divided equally between Husband and Wife. Husband was ordered to pay child support and alimony *in futuro* in the amount of \$400.00 per month for so long as Wife remained single. Wife has never remarried.

Nearly twenty-eight years later, Husband filed a Petition for Termination of Alimony alleging that “as a direct and proximate result of his income significantly decreasing from the entry of the aforementioned orders and memorandum opinion to date, based upon his retirement, and ex-wife’s income significantly increasing, there had been a substantial and material change of circumstances justifying ex-husband’s alimony obligation to wife to be terminated.”

Wife filed an Answer and Counterclaim for Increase claiming that the alleged material change in circumstances would or could have been contemplated at the time of divorce and thus did not warrant termination of alimony. Wife asserted that Husband’s receipt of a large retirement settlement and the capital gains from the sale of various assets could instead be considered material changes in circumstances which were not contemplated at the time of the original divorce and were all to Husband’s benefit. Wife claimed these changes justified an increase in alimony. Each party requested an award of court costs and attorney’s fees.

After hearing the testimony, the trial court dismissed the Husband’s Petition for Termination of Alimony as well as the Counterclaim for Increase in Alimony. The court ordered that the court costs be assessed equally between Husband and Wife. Husband appeals the denial of his petition for termination; Wife appeals the court’s failure to award her attorney’s fees.

TERMINATION OF ALIMONY

“[A] court may not modify or terminate a spousal support award unless it first finds that a substantial and material change in circumstances has occurred since the entry of the original support decree.” *Bogan v. Bogan*, 60 S.W.3d 721, 727-28 (Tenn. 2001) (citing Tenn. Code Ann. § 36-5-101(a)(1) (Supp. 2000)). It is the party seeking the modification in alimony that bears the burden of proving the requisite change in circumstances. *Norvell v. Norvell*, 805 S.W.2d 772, 774 (Tenn. Ct. App. 1990) (citing *Azbill v. Azbill*, 661 S.W.2d 682 (Tenn. Ct. App. 1983)). Each case is fact-driven and the trial court must balance a number of factors when deciding in its sound discretion whether a substantial and material change has occurred. *Bogan*, 60 S.W.3d at 727 (citing *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)). We review findings of fact made by the trial court *de novo* upon the record accompanied by a presumption of the correctness of the findings, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d).

A change in the parties’ circumstances is considered “‘material’ when the change (1) ‘occurred since the entry of the divorce decree ordering the payment of alimony’, and (2) was not ‘anticipated or [within] the contemplation of the parties at the time’” the original support decree was entered. *Bogan*, 60 S.W.3d at 728 (quoting *Watters*, 22 S.W.3d at 821). Thus, a change in circumstances is not considered material if that change was contemplated by the parties at the time of the divorce. *Elliot v. Elliot*, 825 S.W.2d 87, 90 (Tenn. Ct. App. 1991). Furthermore, “a change in the parties’ circumstances is considered ‘substantial’ when it significantly affects either the

obligor's ability to pay or the obligee's need for support." *Bogan*, 60 S.W.3d at 728 (citing *Bowman v. Bowman*, 836 S.W.2d 563, 568 (Tenn. Ct. App. 1991)). In cases seeking to modify or terminate alimony, the need of the obligee for support and the ability of the obligor to provide support must be given equal consideration. *Bogan*, 60 S.W.3d at 730.

At the time the parties divorced, Husband was an airline pilot and captain with Allegheny Airlines, later US Air. In 1978, Husband's gross annual income was approximately \$43,000.00. Husband's average salary increased to approximately \$175,000.00 by 1994. Husband then took an early retirement when US Air bought out the remainder of his employment contract paying Husband a lump sum of \$950,000.00.² Husband invested much of this money in an IRA. Since 1994, Husband has continued to work periodically performing reviews and certifications for the Federal Aviation Administration (FAA). He earns between \$3,000.00 and \$6,000.00 from flight instruction each year and receives net Social Security benefits in excess of \$15,000.00.

Wife did not work outside the home when the parties divorced in 1978. Within a year, Wife got a job working full-time for an Arby's Restaurant earning minimum wage and began working for the State of Tennessee in 1980. Wife has maintained employment with the state since that time and currently works in the Department of Education. As of 2005, Wife's annual salary was approximately \$31,823.00 and she receives under \$10,000.00 net in Social Security benefits. She has a number of fixed-term IRA investments, a money market savings account, and a nominal checking account. Wife has lived an exceedingly modest lifestyle since the divorce.

Husband first argues that his retirement and decrease in earned income constitute a substantial and material change in circumstances warranting the termination of his alimony obligation. However, in his deposition and again at trial, Husband admitted that he filed the petition because he believed Wife did not need the alimony, not because he could not afford to pay the alimony. We address Husband's argument regarding changes in his circumstances despite his admission that he still has the ability to pay Wife \$400.00 per month in alimony. Husband retired in 1994 at the age of 57 less than three years before industry mandated retirement. He offered no evidence suggesting he did not know in 1978 or any time thereafter that he would be required to retire at the age of 60 if he continued working as an airline pilot. As such, we find that Husband's retirement was contemplated by the parties at the time of divorce and does not constitute a material change in circumstances.

Furthermore, Husband retired in 1994 yet did not file this action until 2006. It is difficult to be compelled by the argument that one's retirement some twelve years prior now constitutes a substantial and material change in circumstances. Nonetheless, Husband bases this argument on his claim that he lost between 40-45% of the \$950,000.00 buyout money that he invested in the stock market. This alleged loss provides Husband no relief from his support obligations in part because, as Husband concedes, Wife had no control or input over his investments. Investing in the stock market involves risk but is typically a voluntary act and conscious decision on the part of the

²Federal law mandates that commercial airline pilots retire at age 60. Husband was 57 years of age when he elected to take the buyout in 1994 and was about two and one-half years away from formal retirement.

investor. Much like the voluntary assumption of a financial obligation, a voluntary financial investment resulting in some loss does not alone constitute a change in circumstances. *See Jones v. Jones*, 784 S.W.2d 349, 353 (Tenn. Ct. App. 1989) (holding that purchase of house was a voluntary assumption of financial obligation not constituting a change in circumstances). Notwithstanding his claim, Husband testified that much of this buyout money remains in an IRA from which he has made substantial withdrawals in excess of \$60,000.00 in 2003 and \$40,000.00 in 2004.

On appeal, Husband contends that his heart attack in 2001 has negatively impacted his ability to earn income. The evidence in the record, however, reveals that Husband has provided flight instruction for which he was paid in the years following his heart attack to date. The record also evidences that Husband sold his residence for a net profit of \$791,000.00 in 2004.³ From this amount, Husband spent approximately \$355,000.00 on the purchase of and improvement to a new residence leaving some \$436,000.00 available for him to use at his discretion. The record indicates that Husband used portions of this profit to purchase a 20-year annuity, two vehicles, and to invest leaving at least \$100,000.00 immediately available to him in liquid assets. Thus, the evidence further confirms Husband's ability to pay Wife support in the amount of \$400.00 a month.

Next, Husband claims that a material and substantial change in Wife's circumstances has occurred essentially because she is gainfully employed. Alimony may not be modified or terminated solely because Wife, who had no income at the time of the divorce, earned approximately \$32,000.00 twenty-eight years later unless Husband presents evidence that the amount of alimony originally awarded was based on the presumption that Wife would not subsequently obtain employment. *See McCarty v. McCarty*, 863 S.W.2d 716, 720 (Tenn. Ct. App. 1992) (citing *Jones*, 784 S.W.2d at 353-54); *see also Threadgill v. Threadgill*, 740 S.W.2d 419, 423-24 (Tenn. Ct. App. 1987); *Norvell*, 805 S.W.2d at 774 (alimony recipient's income alone does not warrant a reduction in the payor's alimony obligations). Husband has introduced no evidence suggesting it was not anticipated by the parties that Wife would become gainfully employed following the divorce. As the trial judge observed, "nobody, in my opinion, with a straight face could insist that \$400 a month alimony would not cause them to foresee or even contemplate or have discussed that a person would not be going to work, such as the wife obviously was headed."

We find unpersuasive Husband's insistence that, because Wife's income including Social Security and alimony exceeds her expenses, Wife no longer has a need for alimony. In the absence of any evidence to the contrary, we find that the parties' receipt of Social Security benefits was a fact likely contemplated at the time of divorce and may not be used to support Husband's argument. It appears to this court that Husband is simply tired of paying Wife alimony. Husband considers his alimony payments to be "gravy" money for Wife because her current monthly earned income is enough to cover her monthly expenses. Although Husband may believe his obligations are

³The residence sold by Husband in 2004 was referred to as "the farm" and was not the marital residence of Husband and Wife. Husband's claim that his share of the proceeds from the sale of the marital estate in 1984 (\$16500.00) was used to purchase the farm is unsubstantiated, and the argument that husband pays alimony using assets divided from the marital estate is tenuous at best.

“handouts” and that “29 years with a millstone around your neck is enough[,]” there is no evidence that the initial award of alimony⁴ was unjustified or punitive in nature. *See McClung v. McClung*, 198 S.W.2d 820, 822 (Tenn. Ct. App. 1946) (holding that an award of alimony is not permitted as a penal measure against obligor). Additionally, Wife as the recipient of alimony was not prohibited from living frugally or from investing her savings after the divorce nor was it unforeseeable that she would do so upon obtaining employment.

Accordingly, Husband has not met his burden of proving a substantial and material change in circumstances since the date of the divorce such that warrants termination or even modification of his alimony obligation.

ATTORNEY’S FEES

Wife appeals the matter of attorney’s fees. The trial court declined to award Wife reasonable attorney’s fees because she was not successful in her claim for an increase in alimony. An award of attorney’s fees is within the sound discretion of the trial court. *Stinson v. Stinson*, 161 S.W.3d 438, 447 (Tenn. Ct. App. 2004); *McCarty*, 863 S.W.2d at 722. “A trial court abuses its discretion only when it ‘applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.’” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)).

The court noted that its denial of Wife’s request for attorney’s fees was based solely on the fact that she was not successful on her counterclaim.⁵ While we recognize that Wife filed a counterclaim in response to Husband’s action, we find that it was Husband who forced Wife into court nearly thirty years after the divorce. Husband’s initial petition thus created the need for legal counsel and a substantial portion of Wife’s attorney’s fees. Based on the record and trial transcript, it appears that very little time or argument was spent addressing Wife’s counterclaim. We believe that a more proportional allocation of attorney’s fees is just. We therefore reverse the assessment of attorney’s fees inasmuch as it requires Husband and Wife to pay their respective fees in full. We

⁴This Court has observed with respect to earlier awards of alimony in futuro that:

In 1984, the General Assembly did amend T.C.A. § 36-5-101(d) to provide that alimony should be temporary in duration and rehabilitative in nature whenever possible. T.C.A. § 36-5-101(d), however, does not apply retroactively to alimony awards made prior to 1984, to the extent that it allows courts to terminate alimony payments because an alimony recipient has been rehabilitated or has had time for rehabilitation.

McCarty, 863 S.W.2d at 719.

⁵Addressing Wife’s attorney, the trial judge specifically stated:

“I’m sorry to note that I don’t have enough figures here to increase your client’s income at this point. Anticipated income through [Husband’s attorney] was shown to be adequate for her needs at this point. So as of today’s date, I will dismiss your countercomplaint to increase, simply for that reason. So keeping in mind that’s just for today’s purposes. You did ask for attorney’s fee, so you weren’t successful. I will also deny that.”

remand for further proceedings to determine the time spent and fees incurred litigating Wife's counterclaim versus time spent litigating Husband's petition. Upon this determination, Wife shall be responsible for paying her own attorney's fees so apportioned for time spent in pursuit of her claim. Thus, Wife's fees incurred as a result of Husband's petition shall be assessed against Husband.

Wife also requested attorney's fees for having to respond to Husband's appeal. As Wife was forced to defend Husband's action to terminate alimony on appeal, we grant Wife's request and award her attorney's fees pursuant to Tenn. Code Ann. § 36-5-103(c) in an amount to be determined by the trial court. *See Evans v. Evans*, 2004 WL 1882586, *13 (Tenn. Ct. App. Aug. 23, 2004) (no perm. app. filed).

CONCLUSION

We affirm the trial court's decision not to terminate Husband's alimony obligation but reverse its assessment of attorney's fees as between Husband and Wife and remand for further proceedings consistent with this opinion. Costs of this appeal are assessed against Appellant/Husband, Hiram Leon Allen.

J. STEVEN STAFFORD, SPECIAL JUDGE